

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Disqualification
of Tina Holtman and the
Revocation of the License of Tina Holtman
to Provide Family Childcare

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for Hearing before Administrative Law Judge Steve M. Mihalchick on September 26, 2003, at the Pennington County Courthouse, 101 North Main Street, Thief River Falls, MN 56701. The record closed upon adjournment of the hearing that day.

Alan G. Rogalla, Assistant Pennington County Attorney, Pennington County Courthouse, P.O. Box 396, Thief River Falls, MN 56701, appeared for the Minnesota Department of Human Services (Department) and Pennington County Department of Welfare and Human Services (County).

Kevin T. Duffy, Attorney at Law, 1008 West Second Street, P.O. Box 715, Thief River Falls, MN 56701, appeared for Tina Holtman (Licensee).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration

of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

Whether Licensee poses a risk of harm to the children served by her childcare program? The Administrative Law Judge concludes she does not.

Whether the disqualification of Licensee to provide family childcare should be set aside? The Administrative Law Judge concludes it should.

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee is a resident of Pennington County, licensed as a Family Childcare Provider for approximately seven years. She provides childcare at her residence in Thief River Falls. Licensee's family consists of her husband, a 12-year-old son, and a 10-year-old daughter.

2. Licensee cares for as few as eight and as many as twelve children on any given day, ranging in age from six months to twelve years.^[1] In seven years of doing childcare, Licensee has had no correction orders, no complaints, and no negative actions taken against her license.

3. On October 31, 2002, at approximately 6:30 p.m., Licensee, who had drunk a few beers after daycare hours, was driving back from buying a pizza with her two children and another child when she struck a young female pedestrian who dashed out onto the highway in front of her vehicle.^[2] Thief River Falls police officers responded to the scene and transported the child to a nearby hospital where doctors diagnosed her with a broken femur and put a cast on her leg. Police officers discovered an open can of beer in the vehicle, smelled alcohol on Licensee's breath, and requested that she complete four field sobriety tests, two of which she failed. The officers placed Licensee under arrest and took her to the Pennington County Law Enforcement Center, where her blood alcohol concentration registered at 0.14 percent. At that time, police discovered a prior alcohol related offense of Licensee's that had occurred on August 6, 1993.

4. On November 1, 2002, Licensee was charged with criminal vehicular injury and second degree driving while impaired.^[3]

5. Licensee voluntarily began an outpatient substance abuse program at Northwest Recovery Center on December 3, 2002, under the care of its operator, Paul Olson, a licensed alcohol and drug counselor.^[4]

6. Licensee entered a plea of guilty to the charge of criminal vehicular injury on January 23, 2003.^[5] The Court directed her to cooperate in a pre-sentence investigation and to sign any necessary release forms.

7. By letter dated February 27, 2003, the County informed Licensee that she was disqualified from providing family childcare services based upon the plea of guilty to criminal vehicular injury.^[6] The letter further informed Licensee of her right to submit a written request for reconsideration of the disqualification within 30 days. The County received her request for reconsideration on March 25, 2003.^[7]

8. At Licensee's sentencing on March 3, 2003, the Court stayed adjudication on the criminal vehicular injury charge and dismissed the charge of second degree driving while impaired.^[8] The Assistant County Attorney read the statement of the victim's mother, who requested a face-to-face apology instead of a written one and also asked that Licensee not be punished through the loss of her childcare license. The Court placed Licensee on probation for a period up to three years and sentenced her to 90 days of probationary jail to be served on electronic home monitoring. As conditions of probation, the Court required Licensee to follow through with chemical dependency treatment as recommended by Court Services; sign any necessary release forms; make a face-to-face apology to the victim; abstain from the use, possession, or purchase of any alcoholic beverages or non-prescription controlled substances; consent to random testing of her breath, blood, and urine and random searches of her person, vehicle, and residence; and remain law-abiding. The Court also imposed restitution in the amount of \$264.63.^[9] Both counsel acknowledged that Licensee was taking this matter seriously and progressing well in treatment.^[10]

9. Based upon Licensee's guilty plea and subsequent disqualification from providing daycare, the County completed a Risk of Harm Assessment after receiving her request for reconsideration. The County found that Licensee posed a high risk of harm to the children served by her daycare program due to the severity and recency of the event, the age and vulnerability of the victim, the similarity between the victim and Licensee's clients, and the harm suffered by the victim.^[11] Despite this determination, the County ultimately noted that a variance would be appropriate.

10. By letter to the Department dated March 31, 2003, the County recommended that Licensee's disqualification not be set aside, but that a variance be granted.^[12]

11. In the following months, Licensee met with her probation officer twice each month and complied with all of the conditions of her probation as directed by her probation officer.^[13] She continued in the outpatient treatment program under Olson's care. In Olson's opinion, Licensee made unusually great strides toward recovery, going well beyond what was required of her by the program.

12. Licensee graduated from her outpatient treatment program on June 30, 2003. She and her husband have removed all alcohol from their home. Licensee has abstained from alcohol since the accident on October 31, 2002; she attends local AA meetings two to three times per month and will continue to attend the meetings on the recommendation of Olson; she maintains regular contact with Olson; she continues to comply with all conditions of her probation; and she has received her driver's license back.^[14] Licensee has an active support system to aid in her sobriety.^[15]

13. On July 1, 2003, the Department issued Licensee a Notice of Disqualification - Not Set Aside and Order of Revocation based upon a preponderance of the evidence that Licensee had committed criminal vehicular injury on October 31, 2002, and the resulting risk of harm assessment, citing Minn. Stat. § 245C.14, subd. 1, and Minn. R. 9502.0335, subp. 6.D.^[16] The letter informed Licensee of her right to appeal, which she filed in a timely manner.

14. The Department issued a Notice of and Order for Hearing on July 21, 2003, setting the hearing to take place on September 30, 2003.^[17] Due to a scheduling conflict with counsel, the hearing date was subsequently changed to September 26, 2003.

15. A County licensing worker reassessed and inspected Licensee's home in mid-September, 2003, and renewed Licensee's family childcare license.^[18]

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Pursuant to Minn. Stat. §§ 245A.08, subd. 2a, and 245C.28, this is a consolidated contested case hearing regarding revocation of a family childcare license based upon a disqualification that was not set aside.

4. A family childcare license shall be revoked, not renewed, or suspended if the provider, or any other person residing in the daycare residence, has a disqualification under Minn. Stat. § 245C.14.^[19]

5. The Commissioner may set aside a license disqualification if the Commissioner finds that the individual does not pose a risk of harm to any person served by the provider.^[20] In determining that an individual does not pose a risk of harm, the commissioner shall consider the nature, severity, and consequences of the event or events leading to the disqualification, whether there is more than one disqualifying event, the age and vulnerability of the victim at the time of the event, the

harm suffered by the victim, the similarity between the victim and persons served by the program, the time elapsed without a repeat of the same or similar event, documentation of successful completion by the individual of training and rehabilitation, and any other relevant information. In reviewing a disqualification, the Commissioner shall give "preeminent weight" to the safety of each person to be served by the applicant.

6. Licensee has the burden of proving by a preponderance of the evidence that she does not pose a risk of harm to the clients she serves.^[21] Licensee has proved by a preponderance of the evidence that the disqualification should be set aside because she does not pose a risk of harm to the clients she serves.

7. Pursuant to Minn. R. 9502.0335, subp. 6.A., a provider's license shall be revoked, not renewed, or suspended if the provider abuses alcohol "to the extent that the use or abuse has or may have a negative effect on the ability of the provider to give care or is apparent during the hours children are in care."

8. The rule further provides, "[c]aregivers who have abused . . . alcohol, such that the use, abuse, or dependency has had a negative effect on the ability to give care, was apparent during the hours children are in care, or required treatment or therapy, must have 12 months of verified abstinence before licensure."

9. Licensee's alcohol use did not negatively affect Licensee's ability to give care and was not apparent during daycare hours.

10. The attached Memorandum is incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner set aside the disqualification and reinstate the family childcare license of Licensee.

Dated: October 22, 2003

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape recorded (2 tapes). No transcript prepared.

MEMORANDUM

Since the parties stipulate to Licensee's disqualification, it is her burden to show, by a preponderance of the evidence, that she does not pose a risk of harm to her daycare children, and accordingly, that her license should not be revoked. "Preeminent weight" is given to the safety of Licensee's daycare children.

The Administrative Law Judge disagrees with the Department's risk of harm assessment. The Department's categorization of the nature of the disqualifying event as intentional, overt, or violent does not accurately portray the circumstances of the event. Certainly, Licensee made a conscious decision to drive after drinking, and is responsible for the consequences of that act. But, that the victim was a child and Licensee is a daycare provider is purely coincidental. Licensee did not seek out a child as her victim in any intentional way and does not wish harm on children. There is no logical connection between the fact that a child was hit and the risk to her daycare children.

Licensee expressed regret and remorse about the accident, and concern for the victim. Immediately after the accident, on her own accord, she stopped drinking, removed all alcohol from her house, and entered into the outpatient treatment program. Olson strongly believes that Licensee poses no risk to children or to the community and that she has gone above and beyond in her treatment. Giving preeminent weight to the safety of Licensee's daycare children, she does not pose a risk of harm to those children. She no longer drinks; it is unlikely she will drink again; and her drinking never affected her daycare.

The Department asserts that Minn. R. 9502.0335, subp. 6.A., is not discretionary, and that because Licensee admitted she had a problem with alcohol, entered a treatment program, and has less than 12 months of verified abstinence, the Commissioner has no choice but to determine that the disqualification not be set aside and that the license be revoked.

However, that rule states that a license must be revoked "to the extent that the use or abuse has or may have a negative effect on the ability of the provider to give care or is apparent during the hours children are in care." There is no evidence of any negative effect on Licensee's ability to care for her daycare children. Licensee has never received a correction order or been the subject of any complaint. Licensee's alcohol use was never apparent during daycare hours. Licensee never drank during daycare hours, and only rarely to excess in the evenings. Since October 31, 2002, she has abstained from all alcohol use. Even if Minn. R. 9502.0335, subp. 6.A., did apply in this case, Licensee is only one week short of 12 months of verified abstinence. Licensee's treatment counselor is extremely impressed with Licensee's progress in treatment and confident in her ability to remain sober and pose no risk to children. By the time a final order is issued, she will have been abstinent for over 12 months.

S.M.M.

^[1] Testimony of Licensee.

^[2] Ex. 1.

^[3] Ex. 1.

^[4] Ex. 5. Prior to October 31, 2002, Licensee had been drinking approximately twice per week, only after daycare hours, and occasionally to excess. Testimony of Licensee.

^[5] Ex. 2.

^[6] Ex. 4.

^[7] Ex. 5.

^[8] Ex. 3.

^[9] The Court left the issue of restitution open for one year to account for any future expenses incurred by the victim and to deal with insurance coverage issues. Ex. 3.

^[10] Ex. 3.

^[11] Ex. 7.

^[12] Ex. 6.

^[13] Testimony of Mary Gerardy, Licensee's probation officer.

^[14] Testimony of Licensee.

^[15] Mr. Holtman, Paul Olson, and Mary Gerardy all serve as safeguards against Licensee resuming alcohol consumption.

^[16] Ex. 9.

^[17] Ex. 11.

^[18] Testimony of Melinda Treitline.

^[19] Minn. R. 9502.0335, subp. 6.D.

^[20] Minn. Stat. § 245C.22, subd. 4 (2003).

^[21] Minn. Stat. § 245A.08, subd. 3(b).